United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

Form 280 A. - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Richard A. Mescon being duly sworn deposes and says that he (~~she~~) is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the 29th day of August, 1977 he (~~she~~) served ~~a copy of the address~~ two copies of the within Brief by placing the same in a properly postpaid franked envelope addressed:

Harold Edwards

U.S. Penitentiary

Box P.M.B. 03341-158

Atlanta, Georgia 30315

And deponent further says that he (~~she~~) sealed the said envelope and placed the same in the mailbox for mailing at the United States Attorney's Office, Southern District of New York, One St. Andrew's Plaza, New York, N.Y. 10007, in the Borough of Manhattan, City of New York.

Richard Mescon

Sworn to me before this

29th day of August, 1977

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified In Kings Co.
Commission Expires March 30, 1978

77-2048

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

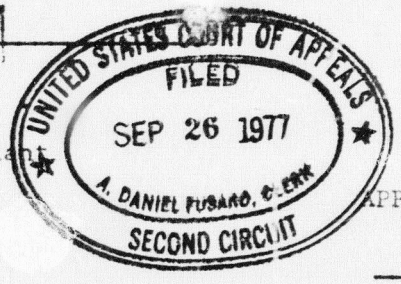
HAROLD EDWARDS,

Petitioner/Appellant

v.

UNITED STATES OF AMERICA,

Respondent/Appellee



APPEAL DOCKET NO.
77-2048

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APPELLANT'S REPLY BRIEF TO BRIEF
FOR THE UNITED STATES OF AMERICA

B
P/K

Appellant submitted his Brief on Appeal presenting two specific issues to this Court for review; restated as follows:

ISSUE I: THE DISTRICT COURT ERRED BY DENYING APPELLANT'S MOTION TO VACATE SENTENCE WITHOUT ORDERING AN EVIDENTIARY HEARING.

ISSUE II: THE FAILURE OF THE GOVERNMENT TO COMPLY WITH THE PROVISIONS OF THE INTERSTATE AGREEMENT OF DETAINERS REQUIRES REVERSAL

The denial of the Motion to Vacate Sentence by the Court below did not reach the merits of Issue II, in that it was based solely on the District Court's interpretation that the plea of guilty by the Appellant waived his right to collaterally attack under the Interstate Agreement on Detainers.

The Government's Brief in Reply raises five points not at issue before the Court as submitted by the Appellant in Brief or by the ORDER of the Court below, nor does the Government refute the Appellant's

Argument raised in Issue I. The Government's reply to Issue II of the Appellant's Brief raises points not at issue in the instant Appeal, nor have they been presented to the Court below, consequently will not be considered by this Court.

The Government's election to ignore the issues on Appeal that were based on the District Court's ORDER denying the Motion to Vacate Sentence leaves this Court with no other alternative but to make their decision from the unrefuted factual issues presented by the Appellant in Brief.

Although the Appellant contends that the Government is procedurally incorrect in presenting arguments not heard by the Court below, the Appellant, in the interest of expediency, will address each of the Points raised by the Government, first restating the Points then submitting rebuttal to the Points.

POINT I - THE DECISION OF THE COURT IN UNITED STATES V. MAURO, 544 F.2d 588 (2d Cir 1976), was incorrect.

This point raised by the Government is frivolous, impertinent, and inconsistent with the Rules of Appellate Procedure. The decision of the Court below did not allege the incorrectness of the Mauro decision in it's decision to deny the Motion to Vacate, nor was it an issue presented in the Brief of the Appellant.

POINT II - THIS COURT'S DECISION IN UNITED STATES V. MAURO SHOULD NOT BE APPLIED RETROACTIVELY.

Again, the Point raised by the Government is not properly before the Court since the Court below disposed of the citation in Mauro as misplaced on the basis that Mauro had plead not guilty and had made timely application for relief, therefore, the retroactivity of Mauro was not at issue in the instant Appeal.

Further, the issue presented in Point II is argumentive with the contention made by the Government in Point I. In Point I, the Government stated that the Mauro decision was the F I R S T reached in any Court of Appeals. The Government's argument in Point II, refers to the retroactivity of "new decisions" (subsequent to an initial judicial interpretation of a statute).

Therefore, Point II is frivolous, and procedurally incorrect since it neither is material to the decision of the Court below, nor was it an issue raised in Brief by the Appellant

POINT III - A VIOLATION OF ARTICLE IV OF THE AGREEMENT IS NOT COGNIZABLE UNDER 18 U.S.C. SECTION 2255.

A collateral review of a conviction and/or sentence is available under a Motion filed pursuant to 28 U.S.C. § 2255 if the Motion alleges that the Petitioner is illegally restrained of his liberty in violation of the Constitution and/or Laws of the United States. The Statute (28 USC 2255), makes it mandatory upon the District Court

to grant a hearing "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall order the Government to show cause, grant a prompt hearing...." Obviously, by the wording of the Statute, at the point in a 2255 proceeding where the Court has requested the Government to show cause why the relief requested should not be granted, a determination has already been made by the Court that the "Motion and the Files and Records of the case" do not conclusively show that relief should not be granted. Therefore, the only source, by law, for the Government to secure facts to controvert the allegations in the motion, are from the records and files, and, of course, these are not restricted to the indictment and selective excerpts of the transcripts, but to the record of the total proceedings. Personal reflections, interpretations and recollections, reduced to writing are not to be presumed a part of the trial records. Halliday v. United States, 380 F 2d 270.

Therefore, since the statute inclues "the motion, and the files and records" as the basis for a 2255 argument, the Appellant suggests that a decision cannot properly be made in the absence of an Evidentiary Hearing.

In Craig v. Beto, 458 F.2d 1131 (CA5, 1972), the only evidence relied upon by the Court to show that the petitioner had knowingly waived his right to counsel was a State Court Docket Sheet. Id at 1135. The docket sheet contained two brief references to the alleged waiver of counsel. The entries reported only that "DEFENDANT IS ADVISED OF HIS RIGHT TO COUNSEL" and "(D)EFENDANT STATED THAT HE DID NOT DESIRE COUNSEL AND WANTED TO PLEAD." The Court found, at the very least, the

docket sheet did not show whether petitioner was advised of his right to appointed counsel. See e.g. Gerzin v. Beto, 459 F.2d 671 (recommendation of a magistrate without benefit of state record).

POINT IV - EDWARDS' PLEA OF GUILTY WAIVED WHATEVER RIGHTS HE OTHERWISE MIGHT HAVE HAD UNDER THE AGREEMENT.

A plea of guilty, when challenged under a collateral attack can only be presumed a 'waiver' of rights if the Records and the Files of the case conclusively show that the plea of guilty was entered knowingly and intelligently with a full understanding of the consequences of the plea. Craig v. Beto, supra.

POINT V - UNITED STATES V. MAURO DOES NOT COMPEL DISMISSAL OF THE INDICTMENT IN THIS CASE.

The issue raised by the Government in Point V has no relevance to the issue on appeal, the decision of the Court below, or to the relief requested and cognizable under 28 U.S.C. § 2255.

Wherefore, the Appellant prays the Court rule on the Issues that are properly before it on appeal, and grant the relief requested in the Brief of the Appellant.

Respectfully submitted,

Harold Edwards

September 20, 1977.

Harold Edwards, Appellant Pro Se

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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HAROLD EDWARDS,

Petitioner/Appellant

v.

UNITED STATES OF AMERICA,

Respondent/Appellee

----------x

APPEAL DOCKET NO.

77-2048

ATTESTATION OF SERVICE

I, HAROLD EDWARDS, declare under penalty of perjury that I have served a copy of the attached "APPELLANT'S REPLY BRIEF TO BRIEF FOR THE UNITED STATES OF AMERICA" upon ROBERT B. FISKE, JR., United States Attorney for the Southern District of New York, U. S. Courthouse - Foley Square, New York, New York 10007, by mailing it on September 20, 1977 from a mailbox at the United States Penitentiary Atlanta, Georgia 30315.

Harold Edwards

Harold Edwards, Appellant Pro Se
United States Penitentiary
Box PMB - 03341-158
Atlanta, Georgia 30315

September 20, 1977